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YOU'LL NEVER WORK IN THIS TOWN AGAIN: EMPLOYMENT, ECONOMICS, AND UNPAID INTERNSHIPS IN THE ENTERTAINMENT AND MEDIA INDUSTRIES

*Mark R. Swiech**

I. INTRODUCTION

“Would it be great if all unpaid internships paid really well? Sure. It would also be great if my dog made breakfast for me every morning, but I’m not going to file a lawsuit over it.”¹ Eric Glatt and Alexander Footman thought differently, having worked on the film *Black Swan* for months without compensation.² In 2011, they filed suit against Fox Searchlight Pictures Inc. (“Searchlight”), alleging they were improperly categorized as unpaid interns during their work on the film when they should have been classified as paid employees.³ Entertainment industry insiders and commentators derided the suit,⁴ warning the plaintiffs that the penalty for their decision was steep: they would never work in this town again.⁵

* J.D. Candidate, May 2016, Loyola Law School, Los Angeles; B.F.A. Musical Theatre, State University of New York at Fredonia, December 2005. Sincerest thanks to Professor Katherine Lyons for her guidance on this Note and beyond. Many thanks to the members of the *Loyola of Los Angeles Law Review* for their hard work on this Note during the publication process. Finally, thanks to P.M., who provided me with a great internship that set me on the path to where I am today.

1. CNN, *The Unpaid Intern's Lament*, YOUTUBE (Sept. 29, 2011), <https://www.youtube.com/watch?v=YcMSuP4pEuU> (featuring Anderson Cooper discussing a lawsuit brought by two unpaid interns).

2. Class Action Complaint ¶¶ 60–61, 76, Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784).

3. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013).

4. E.g., *The Unpaid Intern's Lament*, *supra* note 1.

5. See, e.g., Ivy, Comment to “*Black Swan*” *Unpaid Interns File Lawsuit*, DEADLINE HOLLYWOOD (Sept. 28, 2011, 6:52 PM), <http://deadline.com/2011/09/black-swan-unpaid-interns-file-lawsuit-177312> (“Want a lesson in how to end your film career before it starts, kids? Here ya go!”).

In defense of internships, entertainment professionals touted the long history of unpaid entry-level labor in their industry.⁶ Entertainment industry lawyers argued that the Department of Labor's criteria for judging internships is obsolete and pointed to similar recent suits that had been decided in favor of employers.⁷ For years, Glatt and Footman faced ridicule and professional ostracism while their suit made its way through the district court.⁸ Then, on June 11, 2013, something truly crazy happened—a plot twist so unexpected, even Hollywood did not see it coming: the interns won.⁹

Almost overnight, the long-accepted entertainment industry practice of using unpaid labor as a quasi-form of entry-level employment was thrown into turmoil. Throughout Hollywood, employers raced to determine the legality of their own internship programs. Before employers had time to do anything, however, interns launched additional lawsuits.¹⁰ But this time, complaints of labor abuse and institutional wage theft were no longer confined to the world of film and television. By spring of 2014, unpaid internship lawsuits targeted industries including healthcare, sports, and legal services.¹¹ Fueled by the lingering effects of the Great Recession, a larger conflict was brewing across the nation. This was no longer a simple disagreement about minimum wage between film interns and a film studio. This was a generational clash between the baby boomers and the millennials. This was a showdown between long-held notions of “paying your dues” and being paid what one deserves. This, for better or worse, was the 99 percent against the 1

6. See Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. TIMES (Sept. 28, 2011), <http://www.nytimes.com/2011/09/29/business/interns-file-suit-against-black-swan-producer.html> (“Movie companies have defended using unpaid interns, saying the internships are educational, highly coveted and an important way for young people to break into the industry.”).

7. *Id.*

8. See Zach Schonfeld, *Formerly Homeless Unpaid Intern Leading a Lawsuit Against Warner Music*, NEWSWEEK (July 16, 2014, 7:01 AM), <http://www.newsweek.com/unpaid-internships-warner-music-group-warner-interns-lawsuits-257025>.

9. Eriq Gardner, *Interns Win Huge Victory in Labor Lawsuit over Fox*, THE HOLLYWOOD REP. (June 11, 2013, 6:05 PM), <http://www.hollywoodreporter.com/thr-esq/interns-win-huge-victory-labor-566360>.

10. See generally Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA.ORG, <https://projects.propublica.org/graphics/intern-suits> (last updated Apr. 15, 2014) (listing all lawsuits related to unpaid internships filed since Sept. 16, 2011).

11. *Id.*

percent, with the health of the nation's economy hanging in the balance.¹²

Businesses were not going to sit by idly, while their interns filed suit after suit. Searchlight led the charge by appealing *Glatt* to the Second Circuit;¹³ however, any change in the district court's holding may be too little, too late for Hollywood. Already, *Glatt* has wrought real changes to the way the entertainment industry conducts its entry level hiring.¹⁴ Like any change, though, the positive or negative impacts may not be known on a macro scale for some time. Meanwhile, employers from industries all across the nation watch the *Glatt* appeal closely,¹⁵ none of them naïve enough to believe the effects will be confined to Hollywood.

This Note is a preview to the conclusion of this thrilling saga that is coming soon¹⁶ to a courthouse near you.¹⁷ Part II discusses the background and history of unpaid internships in the entertainment and media industries, including *Glatt*'s facts, reasoning, and its immediate impact. Part III.A explores the employment practices dominating Hollywood prior to *Glatt* and the adverse effects engendered by that regime in contemplation of a Second Circuit reversal. Part III.B considers the possible consequences of post-*Glatt* employment procedures to businesses at large. Part IV evaluates the shortcomings discussed in Part III and proposes a four-pronged approach to amend the law. Finally, Part V concludes that the approach advocated in Part IV would distribute benefits and protections to both employers and employees more fairly than unilateral judicial action could.

12. See Derek Thompson, *The Unluckiest Generation: What Will Become of Millennials?*, THE ATLANTIC (Apr. 26, 2013, 11:31 AM), <http://www.theatlantic.com/business/archive/2013/04/the-unluckiest-generation-what-will-become-of-millennials/275336/>.

13. Notice of Civil Appeal, *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4478 (2d Cir. Nov. 26, 2013).

14. See Eriq Gardner, *How All Those Intern Lawsuits Are Changing Hollywood*, THE HOLLYWOOD REP. (Nov. 6, 2014, 5:00 AM), <http://www.hollywoodreporter.com/thr-esq/how-all-intern-lawsuits-are-746945> [hereinafter Gardner, *Changing Hollywood*].

15. See Abigail Rubenstein, *Unpaid Intern Wage Battle Heats up in 2nd Circ.*, LAW360.COM (Apr. 10, 2014, 4:39 PM), <http://www.law360.com/articles/527031/unpaid-intern-wage-battle-heats-up-in-2nd-circ>.

16. The *Glatt* appeal is expected to be decided sometime in 2015. Daniel Miller & John Horn, *Lawsuit Challenges a Hollywood Pillar: Unpaid Internships*, L.A. TIMES (Apr. 6, 2014), <http://articles.latimes.com/print/2014/apr/06/business/la-fi-ct-hollywood-interns-unpaid-internships>.

17. If you live near the United States Court of Appeals for the Second Circuit, at least.

II. BACKGROUND

A. History and Context of Unpaid Labor in the Media and Entertainment Industries

Prior to the 1970s, unpaid internships were almost unheard of in the American workforce.¹⁸ Through the 1970s and the 1980s, however, the use of paid and unpaid interns as entry-level labor began expanding into the corporate, for-profit sectors.¹⁹ In particular, the “glamour” industries²⁰—a category wherein media and entertainment businesses are unquestionably members—embrace the unpaid internship model. The desirability of working in this sector leads to a glut of individuals seeking entry-level employment. What results is a simple manifestation of supply and demand economics: the huge demand for these competitive jobs allows the suppliers to be hyper-selective when filling a position.²¹ This imbalance, coupled with the existence of the unpaid internship model, removes the salary floor for these positions and effectively creates a “race to the bottom,” dropping wages in these positions to “less than zero.”²² Despite these sobering realities, people continue to flock to unpaid internships in media and entertainment because of two very human reasons: career ambitions and personal dreams.

Competition for unpaid internships in media and entertainment is particularly fierce because entry-level positions in these industries carry a noted potential for upward mobility.²³ Entry-level laborers become assistants; assistants become agents, managers, and studio

18. Those that did exist were mostly found within the confines of the medical profession. This model has largely evolved into the familiar medical resident system in practice today. Roger D. Hodge, *Less than Zero: The Value of Intern Labor in an Age of Economic Inequality*, BOOKFORUM (Summer 2011), http://www.bookforum.com/inprint/018_02/7802.

19. *Id.*

20. See Jordan Weissman, *The Second-Biggest Myth About Unpaid Internships: They're Just for the Rich*, THE ATLANTIC (June 20, 2013, 8:30 AM), <http://www.theatlantic.com/business/archive/2013/06/the-second-biggest-myth-about-unpaid-internships-theyre-just-for-the-rich/277029/>; Christopher Zara, *Fox Intern Lawsuit Could Mean “Swan” Song for Unpaid Labor in Glamour Industries*, INT'L BUS. TIMES (Aug. 14, 2012, 1:48 PM), <http://www.ibtimes.com/fox-intern-lawsuit-could-mean-%E2%80%98swan%E2%80%99-song-unpaid-labor-glamour-industries-743114>.

21. See Abby Lombardi, *What Jobs Have Unbalanced Supply and Demand?*, WANTED ANALYTICS (June 12, 2014), <http://www.wantedanalytics.com/analysis/posts/what-jobs-have-unbalanced-supply-and-demand> (showing twenty-three potential candidates for every one job opening in the Arts, Design, Entertainment & Media sector).

22. Hodge, *supra* note 18.

23. See generally DAVID RENSIN, *THE MAILROOM: HOLLYWOOD HISTORY FROM THE BOTTOM UP* (2003) (detailing the accounts of over 15 entertainment executives who were promoted from entry-level positions).

executives.²⁴ One prominent entertainment industry trade publication issues an annual list of “10 Assistants To Watch,” highlighting those who are likely to be promoted into executive positions in the near future.²⁵ Traditionally, unpaid internships have been the first rung on this ladder and have increasingly become *de facto* prerequisites for assistant positions.²⁶ Since the Great Recession, however, the trend across all industries has been for actual hiring to remain stagnant while unpaid internships increase.²⁷ The lack of openings on the next level up the ladder results in interns trapped in an endless, Kafkaesque-cycle of unpaid labor²⁸ prominent enough to be satirized.²⁹

With thousands of interns³⁰ faced with the prospect of living in the most expensive cities in the country³¹ while working for free, sooner or later, the system was bound to hit a breaking point. That breaking point occurred on September 28, 2011.

B. Glatt v. Fox Searchlight Pictures, Inc.

Black Swan began as a collaboration between director Darren Aronofsky and producer Scott Franklin.³² As production commenced, Lake of Tears, Inc. was formed to produce the film.³³ In November 2009, Lake of Tears, Inc. and Searchlight entered into an agreement to co-produce the film.³⁴

In late 2009, Eric Glatt and Alexander Footman began unpaid internships with Lake of Tears, Inc., specifically to work on *Black*

24. See *id.*; Gardner, *Changing Hollywood*, *supra* note 14 (“‘There is a long, long tradition of intern programs being an integral part of careers in Hollywood,’ argues Rick Levy, partner and general counsel at ICM partners.”).

25. See Ramona Rosales, *Hollywood’s New Leaders: 10 Assistants to Watch*, VARIETY.COM (Oct. 23, 2013, 8:30 AM), <http://variety.com/2013/biz/news/hollywoods-new-leaders-10-assistants-to-watch-1200752599/>.

26. See Miller & Horn, *supra* note 16.

27. See Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME (Apr. 12, 2010), <http://content.time.com/time/magazine/article/0,9171,1977130,00.html>.

28. See Schonfeld, *supra* note 8; see also Alex Williams, *For Interns, All Work and No Payoff*, N.Y. TIMES (Feb. 16, 2014), <http://www.nytimes.com/2014/02/16/fashion/millennials-internships.html> (discussing interns who have worked three or four internships that did not turn into job offers).

29. *Fall Internship Pays off with Coveted Winter Internship*, THE ONION (Jan. 10, 2008), <http://www.theonion.com/articles/fall-internship-pays-off-with-coveted-winter-inter,5975/>.

30. See Miller & Horn, *supra* note 16.

31. See *infra* notes 103–08 and accompanying text.

32. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 522 (S.D.N.Y. 2013).

33. *Id.*

34. *Id.*

Swan.³⁵ Glatt worked as an accounting intern and a post-production assistant;³⁶ Footman worked as an office production intern.³⁷ Glatt's duties included reviewing personnel files, creating spreadsheets, liaising with outside payroll companies, tracking purchase orders and petty cash disbursements, and running errands.³⁸ Footman's assignments included making coffee, fulfilling lunch orders, janitorial tasks, secretarial work, and running errands.³⁹ Except for a single day when Glatt worked for the *Black Swan* Art Department,⁴⁰ neither Glatt nor Footman was paid for their labor.⁴¹ During their internships with Lake of Tears, Inc., both Glatt and Footman worked alongside other interns who performed comparable tasks and were similarly unpaid.⁴²

On September 28, 2011, Glatt and Footman filed suit against Searchlight, alleging violations of, *inter alia*, the federal Fair Labor Standards Act (FLSA).⁴³ After the court determined that Searchlight was Glatt's and Footman's employer,⁴⁴ it inquired whether Glatt and Footman were "employees" for purposes of the FLSA.⁴⁵ Searchlight argued that Glatt and Footman were not employees as defined in the FLSA;⁴⁶ rather, they fell under the "trainee" exception established in *Walling v. Portland Terminal Co.*⁴⁷ Under the *Portland Terminal* exception, a "trainee" is not an "employee" when the trainee does not displace regular employees, does not expedite company business, and primarily benefits himself or herself through the work instead of providing benefit to the company.⁴⁸ Additionally, in 2010, the

35. *Id.*

36. Class Action Complaint ¶¶ 61, 71, Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784).

37. *Id.* ¶¶ 76, 78.

38. *Id.* ¶¶ 68, 74.

39. *Id.* ¶ 79.

40. *Id.* ¶¶ 69–70 ("Glatt was paid . . . for that 12-hour day of work, at an hourly rate of \$8.928571.").

41. *Id.* ¶¶ 85–86.

42. *Id.* ¶ 80.

43. 29 U.S.C. §§ 201–19 (2012).

44. *See generally* Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 525–30 (S.D.N.Y. 2013) (discussing case law and general agency law principles that warrant an extension of liability to Searchlight for its utilization of Glatt's and Footman's services).

45. *Id.* at 530–31.

46. 29 U.S.C. § 203(e)(1) (2012).

47. *Glatt*, 293 F.R.D. at 530; *see Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

48. *Portland Terminal*, 330 U.S. at 149–50, 153.

Department of Labor issued a Fact Sheet⁴⁹ to help for-profit employers determine when an intern must be paid a minimum wage.⁵⁰ Though no single factor is controlling,⁵¹ the six factors that are considered when making this determination are whether:

- (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training, which would be given in an educational environment;
- (2) The internship experience is for the benefit of the intern;
- (3) The intern does not displace regular employees, but works under close supervision of existing staff;
- (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
- (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁵²

Searchlight argued that the Fact Sheet's factors were not the applicable standard in the instant case and that the court should instead adopt the "primary benefit test" used by other circuits in internship litigation.⁵³ The court disagreed, stating that the Fact Sheet's factors find support in *Portland Terminal* and that, as an official publication of the federal agency charged with administering the FLSA, the Fact Sheet is entitled to judicial deference.⁵⁴ After weighing all of the factors, the court held that Glatt and Footman are

49. *Glatt*, 293 F.R.D. at 531; WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET # 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter FACT SHEET # 71].

50. Fact Sheet # 71 explicitly applies to for-profit employers. Nonprofit organizations may have more latitude in this area due to the volunteer nature associated with much work performed in the nonprofit sector, but this area of law is currently unsettled. See 29 U.S.C. § 213(a)(3); FACT SHEET # 71, *supra* note 49; May Harris & Linda Rosenthal, *The Crackdown on Unpaid Internships: Do Nonprofits Have to Worry?*, FORPURPOSELAW.COM (May 20, 2014, 8:20 PM), <http://www.forpurposelaw.com/crackdown-on-unpaid-internship/>.

51. *Glatt*, 293 F.R.D. at 532.

52. FACT SHEET # 71, *supra* note 49, at 1.

53. *Glatt*, 293 F.R.D. at 531. Under the "primary benefit test," an unpaid internship does not violate the FLSA if a court finds that "the . . . benefits to the intern outweigh the benefits to the engaging entity." *Id.*

54. *Id.* at 532. The court also held the "primary benefit test" to be unworkably subjective, noting that "the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable to another, who learned a lot. Under this test, an employer could never know in advance whether it would be required to pay its interns." *Id.*

neither properly classified as unpaid interns under Fact Sheet #71, nor as “trainees” under the *Portland Terminal* “trainee” exception to the FLSA.⁵⁵ Instead, Glatt and Footman should be classified as employees for their services rendered to Searchlight during its production of *Black Swan*.⁵⁶

Glatt opened a floodgate of litigation brought by current and former unpaid interns against the entire spectrum of entertainment and media companies. Following *Glatt*, similar lawsuits were filed against magazine publishers,⁵⁷ websites,⁵⁸ television networks and studios,⁵⁹ record labels,⁶⁰ and talent agencies.⁶¹ While *Glatt* and its ilk have been appealed, the cases are currently pending in the Second Circuit, and the earliest decision is not expected until 2015.⁶² In the meantime, the future of virtually every unpaid internship program in the entertainment industry is now uncertain. Many companies have cancelled their internship programs altogether;⁶³ others have gone to the opposite extreme and now pay all of their interns.⁶⁴ Still others attempt to settle these lawsuits as they come up.⁶⁵ Until the Second Circuit rules, companies will be in the dark as to what steps are needed to comply with the law, how exposure to liability from these

55. *Id.* at 534.

56. *Id.* In the same action, the court certified a joint plaintiff’s proposed class against Searchlight for similar violations of the FLSA involving unpaid internships in a different production. *Id.* at 538–39.

57. *E.g.*, Wang v. Hearst Corp., No. 12 CV 793 HB, 2013 WL 3326650 (S.D.N.Y. June 27, 2013).

58. *E.g.*, Mark v. Gawker Media LLC, No. 13-CV-4347, 2014 WL 4058417 (S.D.N.Y. Aug. 15, 2014).

59. *E.g.*, O’Jeda v. Viacom, Inc., No. 13 Civ. 5658(JMF), 2014 WL 1344604 (S.D.N.Y. Apr. 4, 2014).

60. *E.g.*, Grant v. Warner Music Grp. Corp., No. 13 Civ 4449(PGG), 2014 WL 1918602 (S.D.N.Y. May 13, 2014).

61. *E.g.*, Class Action Complaint, Behzadi v. Int’l Creative Mgmt. Partners, LLC, No. 1:14-cv-04382(LGS), 2015 WL 4210906 (S.D.N.Y. July 9, 2015).

62. Miller & Horn, *supra* note 16. After this Note was written, the Second Circuit vacated and remanded the district court’s decision, rejecting the Fact Sheet’s factors in favor of the primary beneficiary test. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2015); *see supra* note 53. While the case was on remand, the parties settled. Reuters, *21st Century Fox Settles Unpaid Intern Lawsuit*, *FORTUNE* (July 13, 2016, 7:55 AM), <http://fortune.com/2016/07/13/21st-century-fox-settles-unpaid-intern-lawsuits/>.

63. *See, e.g., id.* (reporting that Condé Nast cancelled its entire fall 2013 unpaid internship program in the wake of *Glatt*).

64. *See, e.g., id.* (reporting that Fox, NBCUniversal, Warner Brothers, Sony Pictures, Disney, and Paramount now all pay their interns a minimum wage).

65. *See, e.g., id.* (“Charlie Rose and his production company paid about \$110,000 to settle a lawsuit brought by former unpaid interns.”).

suits can be limited, and what the ultimate economic impact, either way, will be on their businesses.

III. CRITIQUE OF CURRENT LAW

The district court's decision in *Glatt* did not change the current law; rather, the court merely applied existing minimum wage laws in the context of unpaid internships.⁶⁶ If the Second Circuit reverses the decision, it will effectively sanction the pre-*Glatt* regime. If the Second Circuit affirms the decision, it risks creating yet another barrier to entry into these walled garden industries. Part III.A of this Note discusses the effects of pre-*Glatt* FLSA non-enforcement in anticipation of a Second Circuit reversal, including impacts on economics, employment opportunity, and both on- and off-screen diversity. Part III.B of this Note discusses potential problems associated with a Second Circuit affirmance of *Glatt*, including possible adverse effects on entry-level hiring and the asymmetric impact the holding would have on small companies in this sector. Ultimately, both outcomes have shortcomings that will not be addressed by unilateral judicial action.

A. Pre-*Glatt* / Second Circuit Reversal

A Second Circuit reversal of *Glatt* will effectively allow the pre-*Glatt* labor practices to survive and be revived, though evidence suggests that many of the economic and sociological criticisms repeatedly leveled at this sector are tied to effects associated with these practices.⁶⁷ Though the economic and social aspects of the pre-*Glatt* regime overlap significantly in practice, this Note will address each separately for purposes of analysis.

1. The Broader Economic Effects of Unpaid Internships

The United States economy lost 8.8 million jobs during the 2007–2009 recession.⁶⁸ Though entertainment is widely viewed as a

66. See *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

67. See RALPH J. BUNCHE CTR. FOR AFRICAN AM. STUDIES AT UCLA, 2014 HOLLYWOOD DIVERSITY REPORT: MAKING SENSE OF THE DISCONNECT (2014), <http://www.bunchecenter.ucla.edu/wp-content/uploads/2014/02/2014-Hollywood-Diversity-Report-2-12-14.pdf> [hereinafter BUNCHE CTR. REPORT]; Eric Glatt, *Why I Sued Hollywood on Behalf of Unpaid Interns Everywhere*, QUARTZ (Sept. 13, 2013), <http://qz.com/123717/why-i-sued-hollywood-on-behalf-of-unpaid-interns-everywhere/>.

68. Christopher J. Goodman & Steven M. Mance, *Employment Loss and the 2007–2009 Recession: An Overview*, MONTHLY LAB. REV., Apr. 2011, at 3.

“recession-proof” industry,⁶⁹ between 2007 and 2009 in Los Angeles alone over 11,911 industry jobs were eliminated. These jobs represented a loss of approximately 8.41 percent of the entertainment workforce and a net payroll loss of approximately \$207,400,000.⁷⁰ With the entertainment industry comprising a significant portion of the Los Angeles economy,⁷¹ these numbers represent a noticeable blow to the region’s economy when combined with the historic unemployment rates suffered during the heights of the recession.⁷² Though entertainment and media products may enjoy immunity during downturns, entertainment and media employment clearly does not.

The financial losses stemming from the Great Recession left companies across all industries looking for ways to conserve resources, and many resorted to reducing personnel as a solution.⁷³ Many employers turned to unpaid internships to fill the gaps in their labor forces.⁷⁴ The interns themselves were not hard to come by. Record unemployment levels⁷⁵ upended the entire notion of who fills these positions.⁷⁶ Though the Department of Labor ostensibly monitors student internships for employer abuse, regulators overlook

69. See generally Michael Cieply & Brooks Barnes, *In Downturn, Americans Flock to the Movies*, N.Y. TIMES (Feb. 29, 2009), <http://www.nytimes.com/2009/03/01/movies/01films.html> (noting 17.5% ticket sales and 16% attendance level increases during 2009).

70. See ROBERT KLEINHENZ ET AL., THE ENTERTAINMENT INDUSTRY AND THE LOS ANGELES ECONOMY 35–36, 39–40 (2012), <http://laedc.org/wp-content/uploads/2012/04/EntertainmentinLA.pdf> (stating that calculations ignore statistics for live entertainment and independent creative contractors).

71. See *id.* at 2 (estimating that entertainment jobs make up 7.48 percent of all private sector jobs in Los Angeles and contribute over 8 percent to Los Angeles’ overall Gross County Product).

72. Los Angeles County’s unemployment rate peaked at 13.2% in July 2010. BUREAU OF LABOR STATISTICS, LOS ANGELES COUNTY UNEMPLOYMENT RATE, https://www.google.com/publicdata/explore?ds=z1ebjpgk2654c1_&met_y=unemployment_rate&idim=county:CN0603700000000&fdim_y=seasonality:U&hl=en&dl=en (last updated Feb. 5, 2015).

73. See Goodman & Mance, *supra* note 68, at 3.

74. ROSS PERLIN, *INTERN NATION*, at xvii (2011) (“[I]nternships are flourishing as never before thanks to the Great Recession. In a time of chronic high unemployment, internships are replacing untold numbers of full-time jobs: anecdotal evidence abounds of managers eliminating staff and using unpaid interns instead”); see also Kate Harrison, *Why Interns Are Your New Best Friends*, FORBES (July 11, 2012, 3:13 PM), <http://www.forbes.com/sites/kateharrison/2012/07/11/why-unpaid-interns-are-your-new-best-friends/> (“If your company is not taking advantage of the recession’s intern boom—don’t worry! It’s not too late!”).

75. See *Unemployment Rate*, BUREAU OF LAB. STAT., <http://data.bls.gov/timeseries/LNS14000000> (last visited Nov. 9, 2014) (showing the U.S. unemployment rate peaking at 10 percent during October 2009).

76. See Tahmircioglu, *supra* note 27 (“[I]n the Great Recession . . . middle-aged professionals are willing to work for free in hopes that it will help them land a paying gig.”).

non-student interns⁷⁷ even though employers' legal compliance requirements concerning both groups are identical.⁷⁸

The Great Recession ended in the summer of 2009,⁷⁹ but the ensuing recovery has been slow.⁸⁰ Companies that did resume hiring were reluctant to do so at pre-recession salaries.⁸¹ Unpaid internships, however, have continued unabated,⁸² leading more than one commentator to blame the lackluster post-recession job market and stagnant wages on employers' continued reliance on unpaid labor.⁸³

When employers rely on unpaid labor, the buying power of the laboring class is diminished, damaging the economy at large. Interns who receive little-to-no wages do not have the financial means to contribute to economic growth,⁸⁴ leading to reduced spending by the affected population.⁸⁵ Already saddled with record levels of student loan debt,⁸⁶ "millennials,"⁸⁷ the generation most affected by unpaid internship practices,⁸⁸ are delaying the major life events that are metrics of a healthy economy.⁸⁹ Having entered the job market either

77. *See id.* (reporting that non-student interns are "not . . . on [the Department of Labor's] radar screen").

78. *Id.*; *see also* FACT SHEET # 71, *supra* note 49 (applying FLSA standards to internships by the for-profit or non-profit status of the company, not by the student or non-student status of the intern).

79. Goodman & Mance, *supra* note 68, at 5.

80. *See* BARRY Z. CYNAMON & STEVEN M. FAZZARI, *INEQUALITY, THE GREAT RECESSION, AND SLOW RECOVERY* 3 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205524.

81. Chris Kirkham, *Economic Recovery Marked by Lower-Paying Jobs, Analysis Finds*, L.A. TIMES (Aug. 11, 2014, 6:59 PM), <http://www.latimes.com/business/la-fi-income-inequality-20140812-story.html> (reporting that the "break even" point for net job growth was not achieved until 2014, and, on average, these new jobs pay 23% less than jobs lost in the recession).

82. Though the specific number remains untracked, employment experts agree that the amount of unpaid internships has risen substantially in recent years. *See* Williams, *supra* note 28.

83. *See* PERLIN, *supra* note 74, at 71; Ross Eisenbrey, *Unpaid Internships: A Scourge on the Labor Market*, ECON. POL'Y INST. (Feb. 7, 2012, 2:54 PM), <http://www.epi.org/blog/unpaid-internships-scurge-labor-market/>; Neil Howe, *The Unhappy Rise of the Millennial Intern*, FORBES (Apr. 22, 2014, 10:11 AM), <http://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/>.

84. Linda Federico-O'Murchu, *Unpaid Interns Pose New Challenge for Job Seekers*, CNBC (Nov. 17, 2013, 9:00 AM), <http://www.cnbc.com/id/101199651#>.

85. *See* Eisenbrey, *supra* note 83.

86. *See* Phil Izzo, *Congratulations to Class of 2014, Most Indebted Ever*, WALL ST. J. (May 16, 2014, 9:00 AM), <http://blogs.wsj.com/numbers/congratulations-to-class-of-2014-the-most-indebted-ever-1368/>.

87. Defined as a person born in the 1980s or 1990s. *Millennial*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/millennial> (last visited Nov. 11, 2014).

88. *See* Eisenbrey, *supra* note 83 ("[I]t has become common for profit-making business to . . . employ young workers without compensating them.").

89. Thompson, *supra* note 12 ("[G]etting married, having children, buying a house These life stages drive a consumer economy.").

immediately prior to or during the Great Recession,⁹⁰ millennials eschew home ownership,⁹¹ marriage,⁹² and parenthood⁹³ despite their desire to achieve these goals.⁹⁴ This has implications for the further diminution of the middle class and the increase of wealth inequality in America.⁹⁵

In addition, unpaid internships decrease the tax revenue collected by all levels of government. If employers use unpaid interns instead of paid employees, they avoid payroll taxes on those employees,⁹⁶ resulting in decreased payments to workers' compensation programs, unemployment insurance policies, and the Social Security and Medicare trusts.⁹⁷ These decreases will increasingly strain the system as more and more baby boomers reach retirement age.⁹⁸

2. Financially-Related Diminished Employment Opportunity

The entertainment and media industries' widespread utilization of unpaid discriminates against the financially disadvantaged. The unpaid nature of these positions operates as a *de facto* barrier to entry for those who cannot afford to work for free. At the same time, the well-paid, upper ranks of this sector are closed off to those who lack the experience or connections gained in the lower ranks of these industries. Therefore, the replacement of paid entry-level positions in entertainment and media with unpaid

90. See Mark Carter, *The Economic Plight of Millennials*, ECON SOUTH, Jan.–Apr. 2014, at 6, 8; Derek Thompson, *Adulthood, Delayed: What Has the Recession Done to Millennials?*, THE ATLANTIC (Feb. 14, 2012, 9:00 AM), <http://www.theatlantic.com/business/archive/2012/02/adulthood-delayed-what-has-the-recession-done-to-millennials/252913/>.

91. Thompson, *supra* note 12.

92. *Id.*

93. *Id.*

94. See, e.g., Katrina Alcorn, *Millennials Want Children, but They're Not Planning on Them*, N.Y. TIMES MOTHERLODE BLOG (Jan. 8, 2014, 2:16 PM), <http://parenting.blogs.nytimes.com/2014/01/08/millennials-want-children-but-theyre-not-planning-on-them/> ("A majority of millennials in [a recent study] said they wanted to have children someday; they simply didn't see how they could make it work [at present].").

95. See Emily Badger, *The State of America's Widening Wealth Gap*, WASH. POST (Aug. 22, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/22/the-state-of-americas-widening-wealth-gap/>; Federico O'Murchu, *supra* note 84; Erik Kain, *America's Vanishing Middle Class*, FORBES (Sept. 15, 2011, 5:45 PM), <http://www.forbes.com/sites/erikkain/2011/09/15/americas-vanishing-middle-class/>.

96. Eisenbrey, *supra* note 83.

97. *Id.*

98. See *Medicare Solvent Until 2030, Social Security Until 2033*, REUTERS (July 28, 2014, 1:33 PM), <http://www.cnbc.com/id/101860799>.

entry-level internships creates a financial “closed shop” that prevents those of limited means from pursuing careers in these industries.

The financially disadvantaged are excluded from participating in these unpaid internships because doing so entails a very high cost for the intern.⁹⁹ The location requirements of these internships only increase this cost.¹⁰⁰ Los Angeles and New York City are two of the most expensive cities in the nation.¹⁰¹ It is possible to estimate the minimum salary requirements necessary to afford the costs of living in these cities from currently available rental data.¹⁰² Taking Los Angeles (where the majority of unpaid entertainment and media internships are located)¹⁰³ as an example, the average rent of a one-bedroom, one-bathroom apartment is \$1,769 per month.¹⁰⁴ Calculating by the thirty percent rule, it is reasonable to estimate a \$71,666 annual salary is necessary to afford a one bedroom, one bathroom apartment in Los Angeles.¹⁰⁵ Confronted by such daunting financial realities,¹⁰⁶ and the fact that many of these internships preclude the intern from working full-time, paying jobs while

99. See Randy Hoder, *The Privilege of the Unpaid Intern*, N.Y. TIMES MOTHERLODE BLOG (June 19, 2013, 10:58 AM), <http://parenting.blogs.nytimes.com/2013/06/19/the-privilege-of-the-unpaid-intern/> (describing costs associated with the internship the intern incurs despite receiving no salary, including travel, room and board, and incidentals).

100. A search on entertainmentcareers.net for internships nationwide run on Oct. 17, 2014, turned up 910 openings: 576 of which were in the Los Angeles area, 264 of which were in the New York City area. *Internships*, ENTERTAINMENTCAREERS.NET, <http://www.entertainmentcareers.net/> (follow the “Internships” hyperlink under the “Job Seekers” tab on the main page) (last visited Oct. 17, 2014).

101. Stacy Rapacon, *Most Expensive U.S. Cities to Live in*, KIPLINGER (May 2014), <http://www.kiplinger.com/slideshow/real-estate/T006-S001-most-expensive-u-s-cities-to-live-in/>.

102. See MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 1–2, <http://www.census.gov/housing/census/publications/who-can-afford.pdf> (last visited Nov. 12, 2014) (discussing thirty percent as the accepted rent-to-income ratio before a household is “burdened” by the rental cost).

103. See ENTERTAINMENTCAREERS.NET, *supra* note 100.

104. *Rent Trend Data in Los Angeles, California*, RENTJUNGLE, <http://www.rentjungle.com/average-rent-in-los-angeles-rent-trends/> (last visited Nov. 12, 2014) (showing Oct. 2014 data).

105. In New York City, average rent for a one-bedroom, one-bathroom apartment is \$2,933 as of October 2014, requiring an annual income of \$117,320 per the 30% rule. *Rent Trend Data in New York, New York*, RENTJUNGLE, <http://www.rentjungle.com/average-rent-in-new-york-rent-trends/> (last visited Nov. 12, 2014) (showing Oct. 2014 data).

106. According to the most recent U.S. Census Bureau information, median household income in the city of Los Angeles from 2009–2013 was \$49,497. *Los Angeles (City) QuickFacts*, U.S. CENSUS BUREAU (Dec. 4, 2014, 9:35 AM), <http://quickfacts.census.gov/qfd/states/06/0644000.html>.

interning,¹⁰⁷ it becomes clear that only the independently well-off are capable of pursuing these positions.¹⁰⁸

Further exacerbating the problem, entertainment and media are almost exclusively “promote-from-within” businesses.¹⁰⁹ With unpaid internships replacing paid positions as the entry-level position on the ladder,¹¹⁰ those who lack financial means find themselves increasingly precluded from pursuing careers in these fields.¹¹¹

3. Diversity Issues

The same economic realities that prevent the financially disadvantaged from pursuing unpaid internships in media and entertainment also negatively impact racial diversity in this sector. Hollywood, in particular, is routinely criticized for the lack of diversity in its ranks.¹¹² Though this deficiency is most visible in the films and television shows it produces,¹¹³ lack of diversity reaches all the way into the industry’s highest behind-the-scenes positions.¹¹⁴ Some blame this issue on employment and hiring practices.¹¹⁵ After

107. See, e.g., Schonfeld, *supra* note 8 (“[T]he internship required well over 40 hours a week . . .”).

108. Eriq Gardner, *Hollywood Interns’ Lawyer: Cases Will Open Jobs to Less Privileged*, THE HOLLYWOOD REP. (July 17, 2013, 8:23 AM), <http://www.hollywoodreporter.com/thresq/hollywood-interns-lawyer-cases-will-587641> [hereinafter Gardner, *Open Jobs*] (“Generally, people in position to work for free come from privileged backgrounds.”); see also Gardner, *Changing Hollywood*, *supra* note 14 (“[U]npaid internships . . . are too advantageous . . . for the select few who come from affluent backgrounds and can afford to work for no pay.”).

109. See *supra* notes 23–26 and accompanying text; cf., e.g., Ron Ashkenas, *Manager Needed: No Experience Preferred*, FORBES (Mar. 27, 2012, 4:54 PM), <http://www.forbes.com/sites/ronashkenas/2012/03/27/manager-needed-no-experience-preferred/> (describing a major New York City area healthcare system that does not require previous industry experience as prerequisite for its managerial positions).

110. See Miller & Horn, *supra* note 16.

111. See *id.* (“Some view internships as one of the only ways to get a foot in the film business’ narrow door . . .”); Gardner, *Open Jobs*, *supra* note 108 (providing examples of the type of labor performed by unpaid interns in Hollywood).

112. E.g., BUNCHE CTR. REPORT, *supra* note 67.

113. A 2013 study found that of speaking roles in over 600 films produced between 2007 and 2013, 14.1% were African American, 4.9% Hispanic, 4.4% were Asian, and less than 2.4% were “other” (including Native American and Middle Eastern). The remaining 74.1% were white. STACY L. SMITH ET AL., RACE/ETHNICITY IN 600 POPULAR FILMS: EXAMINING ON SCREEN PORTRAYALS AND BEHIND THE CAMERA DIVERSITY 1 (2013), <http://Annenberg.usc.edu/pages/~media/MDSCI/Racial%20Inequality%20in%20Film%202007-2013%20Final.pdf>.

114. Out of the nearly 6,000 Academy of Motion Pictures Arts and Sciences members who are eligible to vote for the Academy Awards, 94% are white and 77% are male. The median age of these voters is sixty-two. John Horn et al., *Oscar Voters Overwhelmingly White, Male*, L.A. TIMES (Feb. 19, 2012), <http://www.latimes.com/entertainment/movies/academy/la-et-unmasking-oscar-academy-project-html-htmlstory.html>.

115. *Id.*

all, lack of diversity is a recognized problem resulting from promote-from-within policies,¹¹⁶ and this problem is magnified in situations where the lower rungs on the hierarchical ladder are already non-diverse.¹¹⁷ Further aggravating this disparity, the income gap between whites and minorities has been increasing for years.¹¹⁸ When these *de facto* financial barriers¹¹⁹ are coupled with the effects of homologous reproduction, it becomes apparent that Hollywood's entry-level hiring practices are a significant factor in the industry's racial stratification.

The effects of homologous reproduction are not confined to a studio's headquarters; this phenomenon reaches out across the entire lot.¹²⁰ White executives hire white producers, who hire white directors, who, in turn, hire white actors over 74 percent of the time.¹²¹ Conversely, black directors cast black actors in 46 percent of all speaking roles in the films they helm.¹²² Though, at a cursory glance, these latter numbers appear encouraging for increased minority representation in media, minority directors are not hired in proportional numbers to their white counterparts.¹²³ The result is a mass-distributed, worldwide portrayal of American culture and society that does not actually reflect American culture and society.¹²⁴ Since 2011, the majority of babies born in America have been

116. STEPHEN C. HARPER, *THE EVER-EVOLVING ENTERPRISE: GUIDELINES FOR CREATING YOUR COMPANY'S FUTURE* 190 (2011); *see also supra* Part II.A (discussing Hollywood's longstanding culture of promotion-from-within).

117. For a thorough discussion of homologous reproduction, the phenomenon where the dominant group in an organization either consciously or subconsciously replicates itself socially and physically within the group to maintain its majority, *see* ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 206–42 (1977).

118. According to a 2013 study, the average family wealth of white, non-Hispanic Americans was six times that of Hispanic and black, non-Hispanic Americans. SIGNE-MARY MCKERNAN ET AL., *URBAN INST., LESS THAN EQUAL: RACIAL DISPARITIES IN WEALTH ACCUMULATION* 1 (2013), <http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf>.

119. *See supra* Part III.A.2.

120. *See* BUNCHE CTR. REPORT, *supra* note 67, at 28 (“[T]he decision makers responsible for the high-stakes productions that constitute Hollywood routinely surround themselves with people with whom they feel comfortable—people who think (and often look) like them.”).

121. *See* SMITH ET AL., *supra* note 113, at 3.

122. *Id.* at 2.

123. In 2013, black directors directed only seven of the one hundred top grossing films and two of these directors directed more than one of these seven films, resulting in just five unique black directors for these films. Only thirty-eight (5.6%) of all 600 top-grossing films from 2007 through 2013 were directed by black directors. *Id.* at 7.

124. *Id.* at 8 (“Despite the demographic changes at work in the U.S., films still portray a homogenized picture of the world.”).

minorities,¹²⁵ and whites are projected to no longer be the majority by 2043.¹²⁶ Indeed, according to projections, this demographic shift already occurred in early 2014 in California, the nation's most populous state.¹²⁷

A whitewashed depiction of American culture is harmful because a society's art is more than mere diversion. Art is the society's culture, itself—a representation of the society and its values. Oftentimes, art is the only testament to the true cultural life of a people that persists after the people have been lost to the dusts of time.¹²⁸ Besides harm to our culture's historical legacy, the systemic under-inclusion of minorities in American media has real effects today. "We live vicariously through the pleasures and pains of the characters presented in these productions In the process, we reflect upon who we are, who we are not, and who we hope to be."¹²⁹ If this is true, Hollywood has resoundingly told minorities they are not a proportionally relevant segment of our population,¹³⁰ they are fair game for hypersexualization,¹³¹ and that, the vast majority of the time, only white men need apply for creative leadership positions within the industry.¹³² Thus, the lack of diversity in media only serves to reinforce stereotypes and further perpetuate inequality across our society.¹³³

125. *Most Children Younger than Age 1 Are Minorities*, Census Bureau Reports, U.S. CENSUS BUREAU (May 17, 2011), <http://www.census.gov/newsroom/releases/archives/population/cb12-90.html>.

126. *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, U.S. CENSUS BUREAU (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

127. CAL. DEP'T OF FIN., NEW POPULATION PROJECTIONS: CALIFORNIA TO SURPASS 50 MILLION IN 2049 1 (2013), <http://www.tularecog.org/DocumentCenter/View/374>.

128. "Y'know[,] Babylon once had two million people in it, and all we know about 'em is the names of the kings and some copies of wheat contracts . . . and contracts for the sale of slaves. Yet every night, all those families sat down to supper, and the father came home from his work, and the smoke went up the chimney, same as here. And even in Greece and Rome, all we know about the *real* life of the people is what we can piece together out of the joking poems and the comedies they wrote for the theatre back then." THORNTON WILDER, *OUR TOWN* act 1 (1938) (ellipsis in original).

129. BUNCHE CTR. REPORT, *supra* note 67, at 2.

130. *See* SMITH ET AL., *supra* note 113, at 3.

131. *Id.* at 2, 5–7 ("Hispanic females . . . were more likely than females from all other races/ethnicities to be shown partially or fully naked on screen.").

132. *Id.* at 2, 7–8; Horn et al., *supra* note 114.

133. *See* BUNCHE CTR. REPORT, *supra* note 67, at 5 ("When marginalized groups in society are absent from the stories a nation tells about itself . . . inequality is normalized and is more likely to be reinforced over time through our prejudices and practices.").

B. *Post-Glatt / Second Circuit Affirmance*

A Second Circuit affirmance of *Glatt* will functionally end the practice of unpaid internships in the entertainment and media industries; indeed, many employers have already implemented new hiring standards in anticipation of this outcome.¹³⁴ Critics of *Glatt* note that two unwanted effects of the ruling are the decrease or elimination of opportunities for entry-level job seekers¹³⁵ and asymmetric negative impact on small businesses operating in this sector.¹³⁶

1. Decrease or Elimination of Entry-Level Job Opportunity

Glatt was initiated to force employers to convert their unpaid internships into paid, FLSA-compliant positions.¹³⁷ An important by-product of this litigation could be the potential opening of entry-level entertainment industry careers to people who are unable to work for free.¹³⁸ Critics and observers, however, worry that these suits may have the opposite effect of eliminating positions and reducing overall entry-level opportunity.¹³⁹ First, fearing liability from intern lawsuits, companies will cancel internship programs altogether, resulting in decreased opportunity for young and/or inexperienced workers.¹⁴⁰ Second, the discontinuation of internships will not result in a corresponding increase in full-time, paid employment; rather, the former intern's position will simply be eliminated.¹⁴¹

An example is illustrative. Consider a typical, small Hollywood production company¹⁴² featuring two executives and two salaried

134. See *supra* notes 63–65.

135. See Deborah L. Jacobs, *Unpaid Intern Lawsuits May Reduce Job Opportunities*, FORBES (Sept. 24, 2013, 6:28 AM), <http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities/>.

136. See Miller & Horn, *supra* note 16 (noting that “the bulk of unpaid Hollywood internships are at smaller [companies].”).

137. See Gardner, *Open Jobs*, *supra* note 108; e.g., *Glatt*, *supra* note 67.

138. Gardner, *Open Jobs*, *supra* note 108.

139. E.g., Jacobs, *supra* note 135.

140. See generally Brief of the Chamber of Commerce of the United States & Cal. Emp’t Law Council as Amici Curiae Supporting Defendants-Appellants, *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4478 (2d Cir. Nov. 26, 2013) (arguing the loss of unpaid internships will translate to loss of opportunity for young and/or inexperienced workers).

141. See Jacobs, *supra* note 135; Karthik R. Kasaraneni & Dhruv K. Singhal, Op-Ed, *Defending Indentured Servitude*, THE HARVARD CRIMSON (Apr. 9, 2010), <http://www.thecrimson.com/article/2010/4/9/unpaid-internships-students-employers/>.

142. See *infra* Part III.B.2 and accompanying notes for further discussion of *Glatt*’s effect on small entertainment industry employers.

assistants. The company is growing and needs to bring on another person to help with day-to-day office tasks (similar to the work performed by the *Glatt* plaintiffs), but cannot afford to pay another employee¹⁴³ without sacrificing product quality or cutting current employees' salaries and risk losing them to competitors. The company decides to bring on an unpaid intern, who has little work experience, and the day-to-day office work is delegated to the unpaid intern. The intern benefits from exposure to the work environment and the company benefits through the increased ability to efficiently allocate its human resources.

The *Glatt* decision would affect this hypothetical company by requiring it to: (1) convert the unpaid position into a paid position; (2) adopt "educational" internship model that solely benefits the intern at a cost to the company; or (3) totally eliminate the internship despite its benefit to both the intern and the company.¹⁴⁴ As premised, this company likely could not afford the first choice. Further, the second choice makes little sense for this company to adopt, since it is in the business of developing entertainment properties, not providing educational opportunities. The third choice is the option this company will likely make. Rather than hiring the intern, the former intern's duties will be re-assigned to the salaried assistants and the intern will be eliminated. Thus, *Glatt*'s immediate effect would likely result in zero net job creation in the majority of entertainment industry companies.¹⁴⁵

Further, *Glatt* may very well cause a reduction of opportunity for the economically disadvantaged, contrary to the increase envisioned by one of the *Glatt* attorneys.¹⁴⁶ If unpaid internships are converted into minimum wage-paying positions, salaries would still fall woefully below a sufficient living wage for Los Angeles or New York City.¹⁴⁷ Interns would be forced to: 1) work more than one job to survive;¹⁴⁸ 2) work the internship as an only job and accept the

143. Including required employment costs, such as federal and state payroll taxes, workers' compensation premiums, insurance premiums, and workers' benefit programs.

144. See *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 534, 539 (S.D.N.Y. 2013); FACT SHEET # 71, *supra* note 49, at 1.

145. See Gardner, *Open Jobs*, *supra* note 108.

146. See *id.*

147. See *supra* notes 103–08 and accompanying text.

148. People who work more than one full-time job face physical and mental health problems at a higher rate than those who only work one full-time job. See generally CTRS. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERTIME AND EXTENDED WORK SHIFTS:

reduced living conditions their wage could afford them; or 3) pursue employment in other sectors—in essence, resulting in the continuation of wealth-based exclusionary employment practices.¹⁴⁹ If internship programs are simply eliminated—as is likely—the famously underpaid Hollywood assistant¹⁵⁰ will become the new entry-level point of employment. Functionally, similar financial barriers to entry would result.

2. *Glatt*'s Asymmetric Effect on Small Businesses

Perhaps the most glaring problem with the *Glatt* ruling is its blanket approach that applies to all companies, regardless of size. Though intern lawsuits against household names like News Corp.,¹⁵¹ Warner Music Group, and Viacom dominate the news, these companies are the minority of the affected class. The Motion Picture Association of America (MPAA), a trade group representing film and television sector employees, estimates that out of the 99,000 companies it represents, 85 percent employ fewer than 10 people.¹⁵² Small businesses contain the bulk of unpaid entertainment industry internships.¹⁵³ However, neither *Glatt* nor Fact Sheet # 71 draws distinctions between international media conglomerates and small production companies when determining FLSA compliance requirements.¹⁵⁴ Thus, the proper yardstick for judging *Glatt*'s effectiveness may not be how quickly a company like News Corp. adopts an alternative to the unpaid internship model, but how quickly

RECENT FINDINGS ON ILLNESSES, INJURIES, AND HEALTH BEHAVIORS (2004), <http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>.

149. See *supra* Part III.A.2.

150. Hollywood assistants can expect to earn between \$10 and \$13 per hour. *Hollywood Salaries Revealed, from Movie Stars to Agents (and Even Their Assistants)*, THE HOLLYWOOD REP. (Oct. 2, 2014, 9:00 AM), <http://www.hollywoodreporter.com/news/Hollywood-salaries-revealed-movie-stars-737321>.

151. *Black Swan* was released in News Corp.'s 2011 fiscal year when Searchlight was a wholly owned subsidiary of News Corp. News Corporation Annual Report 1, 8 (Form 10-K) (Aug. 12, 2011), http://www.sec.gov/Archives/edgar/data/1308161/000119312511221637/d10k.htm#toc174880_25.

152. MOTION PICTURE ASSOC. OF AM., THE ECONOMIC CONTRIBUTION OF THE MOTION PICTURE & TELEVISION INDUSTRY TO THE UNITED STATES (2014) [hereinafter MPAA REPORT], <http://www.mpa.org/wp-content/uploads/2014/09/2014-MPAA-Industry-Economic-Contribution-Factsheet.pdf>.

153. See Miller & Horn, *supra* note 16.

154. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 531 (S.D.N.Y. 2013) (citing FACT SHEET # 71, *supra* note 49) (characterizing *Portland Terminal*'s exceptions to FLSA requirements as "quite narrow" and the Act's "employment" definition as "very broad").

(if at all) small entertainment and media companies do—and the economic impact that results therefrom.

By and large, major film and television studios now pay their interns or have eliminated their internship programs.¹⁵⁵ The economics involved with these entities, though, are a far cry from those that are representative of the majority of employers in this sector. For example, in its 2011 fiscal year, News Corp. reported revenues of \$33.4 billion.¹⁵⁶ The decision to pay interns a minimum wage could not seriously be argued as a financial hardship for News Corp. in light of these numbers. Indeed, after *Glatt*, paying a minimum salary is probably a financially prudent move to avoid the greater potential costs of litigation and settlement.

Though the financial statements of private companies are not publicly available, small companies of less than 10 employees do not generate revenues anything close to those of News Corp. and its competitors. Thus, if the vast majority of entertainment companies are as small as the MPAA estimates,¹⁵⁷ their budgets would be more similar to the hypothetical company discussed in Part III.B.1.¹⁵⁸ Returning to that example, the hypothetical company could not afford the extra salary and incidental costs involved with hiring its unpaid intern and would eliminate the position instead.

Glatt thus has unequal effect on two employers within the same industry. Whereas major companies like News Corp. have the financial resources necessary to pay their interns (or litigate why they should not have to), smaller companies likely do not have that luxury. Realistically, their choice will be to terminate their unpaid internship programs or continue to utilize unpaid interns and risk a lawsuit.

Labor costs are often the most expensive investment a small business makes,¹⁵⁹ yet these costs are often necessary for growth. Companies typically hire new employees when production demands outpace that which current employees can supply.¹⁶⁰ The new employee is brought on to alleviate the imbalance and improve

155. Miller & Horn, *supra* note 16.

156. News Corporation Annual Report 42 (Form 10-K) (Aug. 12, 2011).

157. MPAA REPORT, *supra* note 152.

158. See *supra* Part III.B.1.

159. See Catherine Clifford, *Why a \$14/Hour Employee Costs \$20*, CNN MONEY (Mar. 26, 2010, 9:52 AM), http://money.cnn.com/2010/03/26/smallbusiness/employee_costs/.

160. See RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 48 (1982).

overall productivity for the company. If a company has easier access to capital, it can hire preemptively in anticipation of its needs.¹⁶¹ Conversely, if a company has less access to capital, it may not be able to hire until a labor supply or business demand problem manifests itself.¹⁶² *Glatt* exacerbates this problem because the small businesses that make up the majority of entertainment and media employers are far more likely to be in the latter category.

Because *Glatt* would forbid unpaid internships that provide an immediate advantage to the company,¹⁶³ employers without sufficient cash flow could not expand their workforces unless they could afford to pay the extra salary. Yet, the increased capital to pay for the extra salary may only be realized if the company is capable of handling the output, which was to be handled by hiring an additional employee. If the company could manage the extra business necessary to increase its revenues without hiring new employees, it would likely do so in order to realize a greater profit. Therefore, *Glatt* could have the dual effect of both disincentivizing small business hiring and artificially preventing these companies from growing.

IV. PROPOSAL

Glatt, though a step in the right direction, is ultimately unsatisfactory because of its all-or-nothing solution to the unpaid internship problem. Yet, this outcome is not necessarily the district court's fault; rather, it is merely a limitation of the judicial power itself. After all, courts exist to apply the law, not write it. Given the current language of the FLSA, it is difficult to imagine facts like those in *Glatt* being decided another way. However, the current solution benefits unpaid interns to the detriment of businesses and a

161. Cf. Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game* 17, Harvard Bus. Sch. Working Paper No. 15-004 (2014), http://www.hbs.edu/faculty/Publication%20Files/15-004_09b1bf8b-eb2a-4e63-9c4e-0374f770856f.pdf (“Unlike larger, established corporations, small businesses lack access to public institutional debt and equity capital markets and the vicissitudes of small business profits makes retained earnings a necessarily less stable source of capital, so they become more dependent on bank credit.”).

162. See Karen Mills, *Is a Gap in Small-Business Credit Holding Back the American Economy?*, HARVARD BUS. SCH. WORKING KNOWLEDGE BLOG (July 21, 2014), <http://hbswk.hbs.edu/item/7581.html> (“[I]f we’re going to raise the trajectory of job creation, we must focus on micro-economic strategies that give small businesses and entrepreneurs the resources they need to grow and create more well-paying jobs. One of the most critical of these is capital.”).

163. See *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 533 (S.D.N.Y. 2013); FACT SHEET # 71, *supra* note 49, at 1.

possible Second Circuit reversal would have the exact opposite effect.¹⁶⁴ Clearly, unilateral judicial action is insufficient to fully address this problem.

In an attempt to resolve this issue, Part IV explores the *Portland Terminal* exception and concludes it should not be expanded to encompass modern unpaid internships. Next, this Part proposes a four-pronged approach to amend the FLSA as it applies to internships at for-profit companies.¹⁶⁵ The goal of this approach is to strike a balance between increasing worker protections and meeting employers' needs.

A. *The Portland Terminal Exception and Why It Should Not Apply to Most Modern Unpaid Internships*

Glatt's interpretation of the FLSA and Fact Sheet # 71 make it almost impossible for a for-profit employer to maintain a qualifying unpaid internship program. Fact Sheet # 71, however, is mostly a restatement of the *Portland Terminal* exception,¹⁶⁶ and *Portland Terminal*, itself, is largely the product of a bygone era.¹⁶⁷ *Portland Terminal* was decided in 1947, and the practice at issue was more properly categorized as an apprenticeship than an internship as we know it today.¹⁶⁸ *Portland Terminal* involved unpaid, on-the-job training for blue-collar railroad workers that, for obvious reasons of safety, needed to be completed prior to the workers' transition to unsupervised employment.¹⁶⁹ From these facts, the Supreme Court carved out the "trainee" exception to the FLSA's minimum wage laws.¹⁷⁰ Language from the heart of the *Portland Terminal* opinion would go on to shape Fact Sheet # 71's six factors.¹⁷¹

The blue-collar type of training found in *Portland Terminal* has mostly faded from predominance. White collar, service sector jobs¹⁷²

164. See *supra* note 62.

165. These proposed amendments would be in addition to, not in lieu of, the *Portland Terminal* exception.

166. See Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet # 71"*, 6 OHIO ST. ENTREPREN. BUS. L.J. 67, 80–81, 85 (2011).

167. See *id.* at 81.

168. *Id.*; Steven Greenhouse, *The Unpaid Intern, Legal or Not?*, N.Y. TIMES (Apr. 2, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html>.

169. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947).

170. *Id.* at 153.

171. See *id.* at 149–53.

172. Entertainment and Media employers are members of the various service-providing industries as classified by the Bureau of Labor Statistics. *Industries at a Glance: Service-*

now dominate the American economy¹⁷³ and more American high school graduates enroll in higher education than seek *Portland Terminal*-type apprenticeships.¹⁷⁴ Yet, service sector employers point to *Portland Terminal*'s "trainee" exception as justification for their unpaid internship programs¹⁷⁵ despite these internships probably being outside the scope of *Portland Terminal*'s "trainee" exception.¹⁷⁶ Additionally, *Portland Terminal* itself seems to contemplate the very abuses complained about in *Glatt* (and argued for by Searchlight)¹⁷⁷ as an improper extension of the "trainee" exception.¹⁷⁸ Shoehorning modern, white-collar service sector practices into a mid-twentieth century loophole intended to apply to blue-collar employers makes little sense. Therefore, the *Portland Terminal* approach should be abandoned and Congress should amend the FLSA to better reflect the changed realities faced by today's businesses.

Despite the changing nature of on-the-job training, there are some situations in the service sector where an unpaid *Portland Terminal* training period may be contemplated. For example, it is plausible to imagine a position where employees are required to be proficient with a specialized piece of computer software, without an opportunity for outside training. In this situation, perhaps it is not unreasonable for an employer to demand its employee undergo an

Providing Industries, BUREAU OF LAB. STATS., <http://www.bls.gov/iag/tgs/iag07.htm> (last visited Dec. 18, 2014).

173. Service industries account for 68% of the U.S. Gross Domestic Product and 4 out of 5 U.S. Jobs. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, SERVS., <http://ustr.gov> (follow "Services & Investment" hyperlink under the "Issue Areas" dropdown menu; then follow "Services" hyperlink under the "Resource Center" on the left-hand side of the page) (last visited Apr. 14, 2015).

174. 65.9% of 2013 high school graduates were enrolled in colleges or universities by October 2013. Press Release, Bureau of Labor Statistics, College Enrollment and Work Activity of 2013 High School Graduates (Apr. 22, 2014), <http://www.bls.gov/news.release/hsgec.nr0.htm>.

175. See, e.g., Brief and Special Appendix for Defendants-Appellants at 28–32, *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4478 (2d Cir. Nov. 26, 2013).

176. Compare *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (employer having interns with outside college and/or vocational training perform day-to-day tasks without compensation held to violate the FLSA), with *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (employer having trainees with no outside college or vocational training perform day-to-day tasks under close supervision in order to gain proficiency with those tasks not held to violate the FLSA).

177. See Brief and Special Appendix for Defendants-Appellants, *supra* note 175, at 28–32.

178. See *Portland Terminal*, 330 U.S. at 153 ("[This] holding may open up a way for evasion of [the FLSA]. But . . . [i]t will be time enough to pass upon such evasions when it is contended that they have occurred.").

unpaid “trainee” period while he or she learns how to use the program. Market forces, in turn, would likely protect the employee. A competitor may, for example, offer the same training to its newer employees, but not require the unpaid “trainee” period. This would likely allow the competitor to retain better talent and out-compete the company with the unpaid “trainee” program. As a result, the non-paying company would probably have to pay its trainees to remain competitive within its industry.

Entry-level employment is another situation where regulated unpaid training periods may be desirable. A common complaint among employers today is that colleges and universities are failing to prepare students to enter the work force upon graduation.¹⁷⁹ If employers, through unpaid internships, provide students with on-the-job training that better prepares them for the labor force, perhaps those internship programs should be recognized as a *per se* educational experience. Without safeguards, however, the exception risks swallowing the rule, as all work environments arguably provide some measure of “learning through experience,” regardless of whether the employee is paid or unpaid.¹⁸⁰

B. Proposed Changes to the FLSA

Reform of the laws that control unpaid internships must start with Congress, and this Note recommends four changes to the law. First, an employer’s ability to legally maintain an unpaid internship program needs to be tied to some metric of the employer’s financial health. Second, both the period of time an employer is authorized to have an unpaid intern and the period of time an intern is authorized to work for any single employer should be limited. Third, employers who utilize unpaid internships should be required to pay incidental taxes on those unpaid interns as if they were minimum wage earning employees. Finally, unpaid interns should be afforded the same protections from workplace abuses like discrimination and harassment as paid employees.

Though the specific mechanics of such a system are outside the scope of this Note, it is not hard to envision a “sliding scale” where a company’s ability to utilize unpaid labor is inversely tied to the

179. See Eric McWhinnie, *College Grads: Overqualified and Underprepared?*, USA TODAY (May 24, 2013, 11:31 AM), <http://www.usatoday.com/story/money/business/2013/05/24/college-grads-unprepared/2350633/>.

180. See *Glatt*, 293 F.R.D. at 532–33.

company's revenues, the number of paid employees currently on the company's payroll, or whatever other metric Congress deems an appropriate bellwether of an employer's health. For example, the greater a company's revenue, the fewer unpaid interns a company would be allowed to have—all the way down to zero—and vice versa. This system could be enforced through payroll tax penalties and increased Department of Labor oversight, or by creating private causes of action for affected interns or employees of the company to use in conjunction with the other remedies.¹⁸¹

Next, Congress could place a time limit on both the length of time for which a company is authorized to have an unpaid intern and the length of the unpaid internship itself. For example, a company could be authorized to offer a one-year, non-extendable unpaid internship for a one-year period with the option to extend that authorization period for another year if qualification standards are met. If the standards are not met or the company hires the intern (or any new employee into a comparable position within the year), the internship authorization automatically terminates and the company would be penalized if found to be in violation. If the standards are met and the internship authorization period is extended, the company would be allowed to offer another one-year internship, but would not be allowed to keep the same intern. This would discourage the company from manipulating its qualification criteria in bad faith to retain a particularly liked intern without pay for another year. Simultaneously, it would encourage the intern to be proactive in his or her own search for paid employment. Finally, it would also encourage the company to hire well-liked interns before their authorization expires and the intern (now with more training) seeks employment with a competitor.

Further, Congress should require employers who utilize unpaid interns to pay payroll taxes, workers' compensation premiums, and other insurance costs on their interns as if they were minimum wage employees. This would: (1) ensure companies are not getting an exception from minimum wage laws at no cost; (2) provide financial protection for currently uncovered unpaid interns that paid

181. Private causes of action exist under the current version of the FLSA; however, interns are understandably reticent to sue the employers they seek employment from. Hence, government enforcement is also needed to effectively police these violations. See Eric M. Fink, *No Money, 'Mo Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 441 (2013).

employees enjoy;¹⁸² and (3) prevent government subsidization of an intern-utilizing company over its non-intern utilizing competitor due to unequal taxation. Additionally, these costs would likely be small enough for most employers to bear without undue burden,¹⁸³ yet large enough for an employer to avoid taking on if they did not have to.

Finally, Congress should extend the same protections to interns that it has already afforded to employees. Under Title VII of the Civil Rights Act of 1964,¹⁸⁴ workplace discrimination and harassment bans only apply to “employees.”¹⁸⁵ Though “employee” is not defined in the Act, the first step courts use to determine whether or not an individual is an employee is inquiring if he or she is paid.¹⁸⁶ Thus, courts have consistently found that unpaid interns do not meet the Civil Rights Act’s “employee” requirement to qualify for these important protections.¹⁸⁷ Without amendment, Congress risks creating a second-class tier of laborers who are not only uncompensated, but have no recourse against the most pernicious types of employer abuse.

V. CONCLUSION

Unpaid internships have long been the foot-in-the-door to the entertainment and media industries; but until now, the legality of the practice was rarely challenged. Through cases like *Glatt*, interns have finally begun breaking the code of silence and questioning the system that depresses their economic power and their personal worth, both as contributing members of the work force and as human beings.

Though Anderson Cooper was likely trying to be humorous when he made the glib comparison between an unpaid intern’s labor

182. Eisenbrey, *supra* note 83.

183. A California employer incurs approximately \$1,844.82 in taxes, insurance premiums, and administrative fees per minimum wage employee on its payroll. *How Much Does It Cost to Employ You?*, POLITICALCALCULATIONS (Sept. 15, 2010, 3:37 AM), <http://politicalcalculations.blogspot.com/2010/09/how-much-does-it-cost-to-employ-you.html#.VJNqbsAAM>.

184. 42 U.S.C. §§ 2000e–2000e-17 (2012).

185. Bacon, *supra* note 166, at 81.

186. *Id.*

187. See, e.g., *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (granting summary judgment for defendant in a sexual harassment suit because the unpaid nature of a student internship was determinative—thus, the plaintiff did not qualify for “employee” antidiscrimination protections under the Civil Rights Act).

and his dog making breakfast,¹⁸⁸ his ridicule raises the very issue interns are litigating: labor, whether it is performing office work, running errands, or making breakfast, deserves minimum compensation.¹⁸⁹ Additionally, interns, despite the base characterization, are not dogs. They are individuals capable of demonstrating legal standing—as many companies have very expensively discovered through litigation. Ultimately, however, the solution is not one courts can reach unilaterally. Congress, employers, and the judiciary must work together to reach an equitable solution that benefits both employers and employees while providing entry-level workers, the most vulnerable members of our nation's work force, with the protections necessary to ensure a successful start to their careers.

188. *The Unpaid Intern's Lament*, *supra* note 1.

189. Indeed, a cook who would prepare Mr. Cooper's breakfast could expect to earn, on average, \$22,160 per year. Occupational Employment and Wages, May 2013: Cooks, Restaurant, BUREAU OF LAB. STATS., <http://www.bls.gov/oes/current/oes352014.htm> (last visited Mar. 4, 2015).

